NO. 20887

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANIER ALLISON RAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Central Division, adjudging appellant to be guilty as charged in both counts of a two count indictment at the conclusion of a court trial [C. T. 8]. 1/

The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2113(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

1/ "C. T." refers to the Clerk's Transcript of record.

II

STATEMENT OF THE CASE

Appellant was charged with two counts, in a two count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant, Lanier Allison Ramer, by force and violence and by intimidation, knowingly and wilfully took from Mary Jane Peppard, teller, $970.00, belonging to, and in the care, custody, control, management and possession of Bank of America, Sunset-Echo Park Branch, 1572 Sunset Boulevard, Los Angeles, California, a bank whose deposits were insured by the Federal Deposit Insurance Corporation [C. T. 2].

Count Two charges that appellant, Lanier Allison Ramer, by force and violence and by intimidation, knowingly and wilfully took from Mary Byrne, teller, $590.00, belonging to, and in the care, custody, control, management and possession of Crocker-Citizens National Bank, Seventh and Alvarado Branch, 2044 West Seventh Street, Los Angeles, California, a national bank, a member of the Federal Reserve System and a bank whose deposits were insured by the Federal Deposit Insurance Corporation [C. T. 3].

A Court trial of appellant, Lanier Allison Ramer, commenced on March 12, 1965, before United States District Judge Gus J. Solomon, and appellant was found guilty as charged [C. T. 8]. On March 12, 1965, the appellant was "sentenced to the maximum period on Count One only, for study as described in Title 18, Section 4208(c), the results of the study to be furnished this Court

within three months, where upon sentence of imprisonment shall be subject to modification in accordance with Title 18, Section 4208(b)." Count Two was stayed pending results of said study [C.T. 9].

On August 27, 1965, the appellant was sentenced to the custody of the Attorney General for a period of ten years, said sentence to include the time defendant has already served. Defendant to become eligible for parole at such time as may be determined by the Parole Board. Same sentence as to Count Two, to run concurrently with sentence imposed in Count One [C. T. 11]. Appellant thereafter filed a timely notice of appeal [C. T. 12].

III

QUESTIONS PRESENTED

1. Whether the District Court committed error in holding that the Prosecution had sustained its burden of proving the appellant's sanity?

2. Whether the District Court committed error in admitting appellant's confession to the two bank robberies of November 11, 1964, when it was established that at the start of the interview, the appellant was advised by the F. B. I., who was questioning the appellant, that he did not have to furnish any information, that any information he did furnish could be used against him in a court of law, and if he did not have an attorney, a judge would appoint one for him?

3. Whether the Fifth Amendment due process clause requires uniformity by the various Circuit Courts of Appeals of their application of test of criminal responsibility?

IV

STATEMENT OF FACTS

On November 11, 1964, the appellant at about 1:50 P. M., entered the Bank of America, Sunset-Echo Park Branch, in Los Angeles. On approaching teller Mary Jane Peppard, he stated: "give me all the money you have got from hundred dollar bills down" [R. T. 6, 7], 2/ and when she momentarily hesitated, he stated, "I'm not kidding" [R. T. 7]. As the appellant stood in the front of her he kept his right hand in his coat pocket as if simulating his holding of a gun in his coat pocket. As she bent over while taking currency from her cash drawer, appellant stated, "don't step on it" [R. T. 8], referring to an alarm. She turned over some single dollar bills, and he said, "No, not that, the 20's". She gave the appellant a number of twenty dollar bills with some decoy money [R. T. 7]. Mary Peppard testified that the appellant appeared nervous and she recalled she could smell a light smell of alcohol on his breath.

On November 11, 1964, shortly after 2:00 P. M., appellant entered the Crocker-Citizens National Bank, Seventh and Alvarado

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2/ "R. T." refers to Reporter's Transcript of Record.

Branch, and stood behind a customer, who was being waited on by teller Mary Byrne. After the customer left the window, the appellant stepped up to Mrs. Byrne and said, "Give me all the tens and twenties you have" [R. T. 12]. Mrs. Byrne placed on her counter loose ten and twenty dollar bills, which the appellant immediately put in his coat pocket, and walked out of the bank by the front door. Mrs. Byrne immediately reported the robbery to the Assistant Manager, who observed the appellant enter a vehicle and got the license number [R. T. 12]. Within minutes after the robbery the getaway car used by the appellant was located parked on the Southwest corner of Bonnie Brae and West Ninth Street, across from Mac's Lounge on West Ninth Street [R. T. 16]. Patrolman N. D. Murrer entered Mac's Lounge, and observed appellant jump up, and run to the rear to the restroom. The appellant barricaded himself in the restroom and refused to come out. Detective Sam Massender, of the Los Angeles Police Department fired a shot through the restroom door and the appellant immediately came out and was placed under arrest [R. T. 17]. In a wastebasket in the men's room was found a slip of paper bearing the appellant's name, along with a total of $1,392.00, including several bills with bait money serial numbers from the two banks [R. T. 21]. A search of the appellant's pants pocket revealed $161.00, including numerous bills with recorded serial numbers taken in the robberies.

The appellant was interviewed by Agent Emmit J. Murphy of the Federal Bureau of Investigation in the presence of Detective

Richard Reed, Los Angeles Police Department, on November 11, 1964, starting at about 4:05 P. M., at the Los Angeles Police Department [R. T. 28].

At the start of the interview the appellant was advised by Agent Murphy, that he need not furnish any information, and any information furnished by him would be done freely and voluntarily without any threats being made to him, that any information he might furnish could be used against him in a court of law, that he had a right to consult an attorney before making any statement, and that if he did not have an attorney, an attorney would be provided for him by the judge [R. T. 29, 30].

The appellant indicated that he would talk to the Agent, but he first wanted to talk to his wife. He tried on two occasions, for twenty and fifteen minutes each time, but was not able to reach her [R. T. 31, 32].

The appellant related his version of the bank robberies to Agent Murphy. Agent Murphy testified, "he said because of his financial difficulties, he decided to rob a bank" [R. T. 32]. "He didn't have any particular bank in mind. He left home about 10:00 A. M., that morning. He said he went down to Mac's Bar, had a couple of beers." "He claims that he drove to the first ---- to the Bank of America, Sunset-Echo Park Branch, parked his car, he said, in front of the bank, walked to a lady teller in about the middle of the row, and said 'give me your money'. And he said she gave him money. We asked him about simulating a gun or even simulated possession of a gun" [R. T. 32]. "He walked out of the

bank, got into his car, drove directly to the Crocker-Citizens National Bank. He again parked his car in front of the bank, walked up to the teller, and said 'give me your money' and this was his version, he said at that bank the girl said, 'are you kidding', and he said no he wasn't. So she started to give him some ones and he said not ones, twenties. This conflicts, Your Honor, but this is his version. After getting the money, he ran, got back out in his car and he said he walked out to his car, got into his car and drove to Mac's Bar at Ninth and Bonnie Brae, parked his car, went in and had a few more. He said 'I had a few more beers'." [R. T. 33].

Agent Murphy testified that he noticed nothing unusual about the appellant during the interview [R. T. 34].

Agent James J. Deary, of the Federal Bureau of Investigation, testified as to a bank robbery on December 11, 1956, by appellant of the Connecticut National Bank, and the details of a written statement signed by the appellant admitting the robbery [R. T. 40-46].

Royal N. Perkins, also an Agent of the Federal Bureau of Investigation, testified as to an interview he had with the appellant on December 12, 1956 at the Hartford County Jail, in Hartford, Connecticut, concerning a bank robbery in Meriden, Connecticut. The written statement of the appellant was admitted without objection [R. T. 49]. Agent Perkins testified [R. T. 52], that the appellant said (concerning the Connecticut bank robbery), "I was in a hazy state of mind when I left the house at 100 Round Hill Road,

due to the amount of liquor I had consumed. I could not recall all of my activities after leaving the house. I don't recall where I parked Charles' car after arriving in downtown Meridan. I recall something red in front of me. This was possibly a red sweater worn by the teller. I don't recall entering the bank or what I may have said to the teller. I don't recall picking up any money on leaving the bank. The only thing I do recall is being in a stationery store and looking at a typewriter. The next thing I recall is being grabbed and then being taken next door to the bank." [R. T. 52, 53].

Agent Hector L. Pellegatta, of the Federal Bureau of Investigation, testified as to an interview given by the appellant on June 1, 1960, concerning the robbery of the Bank of America in Riverside, California [R. T. 67].

Dr. Carl O. Von Hagen, was called as a witness in behalf of the plaintiff in rebuttal, as a specialist in psychiatry. There was a stipulation as to his qualifications as a board certified psychiatrist. After testifying as to the present offense [R. T. 70-72], and prior offenses by the appellant, he testified as to what the appellant had told him concerning the events leading up to the present offense. Dr. Von Hagen testified that the appellant told him,

> "On the day of the robberies he hadn't had anything to eat [referring to the robberies of November 11, 1964] for two days previously. He dropped by to see a friend who got him the introduction at the freight docks, she

owns a small tavern near his home. He knows he had some beer in the tavern but can't recall how much. This must have been around 11:00 in the morning. He doesn't recall leaving this or what time he left. He does recall just a fleeting glimpse of himself standing in the bank and it seems as though his environment would expand to much more than normal size and then diminish to the point where he doesn't recall what happened next." [R. T. 72].

Dr. Von Hagen went on to testify that the appellant stated,

"The first recollection he has is sitting in the Los Angeles Police Department interrogation room, recalling raving about something to the interrogating officer. This was about 6:00 P. M. The interrogating officer read back to him a statement of what happened and asked the defendant to sign it. The defendant forgets what they told him." [R. T. 73].

Dr. Von Hagen went on to testify that during his examination,

"From a psychiatric standpoint he was alert and cooperative, oriented, and expressed no abnormalities and showed no abnormal emotional attitude." [R. T. 74].

Dr. Von Hagen testified that it was his opinion that the appellant was capable of assisting in his own defense, and was sane at the time of his interview [R. T. 76].

"THE COURT: Assuming all the things that the defendant told you to be true, do you have an opinion as to whether he was sane at the time of the bank robbery?

"DR. VON HAGEN: I had a sort of an uncertain opinion, Your Honor, and that was that he . . . assuming everything he said was true . . . it was possible that he could have been in a fugue state, now there are several things about this that bother me." [R. T. 76, 77].

"THE COURT: Assume that people with whom he talked shortly after the robberies on November 11, 1964, testified that he told them in some detail what had happened, how the robberies had occurred, would that change your opinion?

"DR. VON HAGEN: Yes, it would.

"THE COURT: And how would it change your opinion?

"DR. VON HAGEN: Well, I would think then that he was not in a fugue state at the time of the commission of the offense." [R. T. 78].

* * *

"THE COURT: Do you have an opinion as to whether he knew the difference between right and wrong at the time he committed the offenses on November 11, 1964?

"DR. VON HAGEN: Yes.

"THE COURT: And what is your opinion?

"DR. VON HAGEN: I believe that he was probably capable of determining right from wrong at that time.

"THE COURT: Do you have an opinion as to whether he was acting under irresistible impulse at those times?

"DR. VON HAGEN: Yes.

"THE COURT: And what is your opinion?

"DR. VON HAGEN: I don't believe he was."

[R. T. 81].

Dr. Robert Haywood Davenport, a clinical psychologist, testified in behalf of the appellant. He did not give an opinion as to the mental competence of the appellant but did present some deductions based on the psychological tests he performed on the appellant. He testified that the appellant was a "rather severely disturbed person who had difficulty keeping reality in constant focus, tended to overstep the bounds of reality as presented by the testing situations. He tended to show a great deal of anger and violence underneath what to me, on the surface appeared to be a very pleasant, quiet, soft-spoken man." [R. T. 102].

Dr. Erric Henry Marcus was called to testify in behalf of the appellant. He testified that the appellant knew the difference between right and wrong at the time he took the money from the two banks [R. T. 119].

Dr. Marcus was asked the question,

"And in your opinion, was he able to control

his will? In other words, was he able to prevent himself from mentally doing what he did at the time he did, at the time he entered the two banks and took the money?

"DR. MARCUS: No, I don't think he could."

[R. T. 120].

Mrs. Virginia Allison Ramer, the mother of the appellant and Mrs. Doretta Lorraine Ramer testified as to the unusual behavior of the appellant from childhood, up to the time of the offense in question [R. T. 105-115].

V

SUMMARY OF ARGUMENT

The specifications of error alleged by the appellant are clearly without merit or foundation.

On appeal, when considering an attack upon the sufficiency of the evidence, the Appellate Court must view the evidence at the trial in the light most favorable to the Government, together with all inferences which may be drawn therefrom.

The appellant did not make a motion for judgment of acquittal at any time during the course of the trial, therefore the question of the sufficiency of the evidence is not open on appeal.

The testimony of Dr. Von Hagen that on November 11, 1964, the date when the offenses were committed, that the appellant knew

the difference between right and wrong, and that he was not acting under an irresistible impulse if believed by the Court was sufficient evidence for the Court to find the appellant was sane at the time of the offense.

Appellant's post arrest confession to the two bank robberies of November 11, 1964 after he had been advised that he did not have to furnish any information, that any information that he did furnish could be used against him in a court of law, if he did not have an attorney a judge would appoint one for him, was admissible in evidence.

The appellant did not object to the admission of the confession of the two bank robberies, on the basis that an attorney was not present at the time of the statements, and therefore cannot raise the issue for the first time on appeal, since the admission of such evidence does not constitute plain error.

The Fifth Amendment due process clause does not require uniformity by the various Circuit Courts of Appeal in their application of the test of criminal responsibility.

What is required under the due process clause is that the Court not act arbitrarily. The Court was duty bound to apply the M'Naughten - irresistible impulse test under the doctrine of stare decisis. And finally, the appellant did not raise the issue of lack of uniformity in the test of criminal responsibility among the various Circuits in the District Court, therefore cannot raise it for the first time on appeal.

VI

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE PROSECUTION HAD SUSTAINED ITS BURDEN OF PROVING THE APPELLANT'S SANITY.

(a) On appeal, when considering an attack upon the sufficiency of the evidence, the Appellate Court must view the evidence at the trial taken in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom.

Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F. 2d 825 (9th Cir. 1964);

Morco v. United States, 301 F. 2d 180 (9th Cir. 1962);

Bolen v. United States, 303 F. 2d 870 (9th Cir. 1962).

(b) The appellant did not make a motion for judgment of acquittal at any time during the course of the trial [R. T. 93, 137], the question of the sufficiency of the evidence is not open on appeal.

Before the appellant can ask this Court to review the judgment of the District Court on the grounds of the sufficiency of the evidence, he must preserve this basis by appropriate motion in the trial court.

By failing to interpose his objection in the trial court, appellant has waived his right to appeal on the sufficiency of the evidence.

Hardwick v. United States, 296 F. 2d 24
(9th Cir. 1961);
Foster v. United States, 318 F. 2d 684
(9th Cir. 1963);
Castro v. United States, 323 F. 2d 683
(9th Cir. 1963);
Dawkin v. United States, 324 F. 2d 521
(9th Cir. 1963).

(c) The Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a miscarriage of justice.

Rule 52(b), Federal Rules of Criminal Procedure;
Bruno v. United States, 259 F. 2d 8 (9th Cir. 1958);
Lucas v. United States, 325 F. 2d 867
(9th Cir. 1963).

In this case there would be no injustice, since the evidence was sufficient to support a finding of guilty under the test of criminal insanity in the Ninth Circuit, M'Naughten-"irresistible impulse".

Sauer v. United States, 241 F. 2d 640 (9th Cir.),
cert. den. 354 U.S. 940, 77 S. Ct. 405 (1957);
Smith v. United States, 342 F. 2d 725 (9th Cir. 1965);

Dr. Carl O. Von Hagan, a specialist in psychiatry was called by the plaintiff in rebuttal, testified as follows:

"THE COURT: Do you have an opinion as to whether he knew the difference between right and wrong at the time he committed the offenses on November 11, 1964?

"THE WITNESS: Yes.

"THE COURT: And what is your opinion?

"THE WITNESS: I believe that he was probably capable of determining right from wrong at that time.

"THE COURT: Do you have an opinion as to whether he was acting under irresistible impulse at those times?

"THE WITNESS: Yes.

"THE COURT: And what is your opinion?

"THE WITNESS: I don't believe he was." [R. T. 81].

The testimony of Dr. Von Hagen that on November 11, 1964, the date when the offenses were committed, that the appellant knew the difference between right and wrong, and that he was not acting under an irresistible impulse if believed by the Court was sufficient evidence for the Court to find that the appellant was sane at the time of the offenses.

The testimony of Mary Jane Peppard [R. T. 7, 8, 9, 10] and Mary Diane Byrne, Samuel R. Massender [R. T. 231], Mack

Johnson [R. T. 26], Emmit Murphy [R. T. 26], would indicate that the appellant was coherent, and alert in the period of time including the robbery.

Also of note was the fact that the appellant gave Agent Murphy of the Federal Bureau of Investigation a detailed statement of the procedure he used in robbing the two banks, including some of the conversation. This was the same day the robberies took place [R. T. 31-34].

In the opinion of Dr. Von Hagen, this detailed recollection by the appellant is inconsistent with a fugue state and irresistible impulse [R. T. 75].

II. THE TRIAL COURT DID NOT ERR IN ADMITTING THE CONFESSION OF THE APPELLANT OF THE TWO BANK ROBBERIES OF NOVEMBER 11, 1964.

The appellant was interviewed by Agent Emmett Murphy of the Federal Bureau of Investigation on November 11, 1964 on his involvement in two bank robberies on that date. At the start of the interview he was advised by Agent Murphy, that he did not have to furnish any information, that any information that he did furnish could be used against him in a court of law [R. T. 29]. If he did not have an attorney a judge would appoint one for him [R. T. 30].

The case before the Court was tried on March 12, 1965, thus this case is controlled by pre-Miranda (Miranda v. Arizona,

384 U.S. 436 [1966]) rules of law as to the admissibility of confessions. Johnson and Cassidy v. New Jersey, 384 U.S. 719 (1966), which held that the requirements of Miranda are to apply only to cases the trial of which began after June 13, 1966.

A subject's post-arrest statements made after he has been advised of his right to remain silent and after he has been made aware of or has demonstrated that he knows that he may have the assistance of counsel at that stage, are admissible in evidence.

Payne v. United States, 340 F. 2d 748, 750, 752 (9th Cir. 1965);

Dawson v. City of Los Angeles, State of California, 342 F. 2d 986, 987 (9th Cir. 1965);

Latham v. Crouse, 338 F. 2d 658 (10th Cir. 1964);

Otney v. United States, 340 F. 2d 699, 702 (10th Cir. 1965).

No objection was made at the trial, by appellant's attorney, to the introduction of the evidence of the confession [R. T. 30-34].

If one does not object at the trial to the admission of incriminatory statements made by him to law enforcement officials during the post-arrest stage on the grounds he did not have an appointed or retained attorney present at the time of such statements, he may not for the first time raise such an issue on appeal, since such admission is not "plain error" under Rule 52(b), Federal Rules of Criminal Procedure.

Jackson v. United States, 337 F. 2d 136 (D. C. Cir. 1964);

Moon v. United States, 317 F. 2d 544, 545
(D.C. Cir. 1962);
Timmons v. Peyton, 240 F. Supp. 749, 759
(E.D. Virg. 1965);
United States v. Rundle, 241 F. Supp. 11, 14
(E.D. Pa. 1965).

If a defendant knowingly is aware of his right to remain silent and to have counsel, and does not request such counsel, he has waived such assistance.

United States v. Childress, 347 F. 2d 448, 450
(7th Cir. 1965);
Hayes v. United States, 347 F. 2d 668 (8th Cir. 1965);
United States v. Konigsberg, 336 F. 2d 844
(3rd Cir. 1964);
Edwards v. Holman, 342 F. 2d 679, 683
(5th Cir. 1965).

Agent Murphy testified as follows concerning the condition of the appellant at the time of his interview with appellant [R. T. 29]:

"THE COURT: What was the defendant's condition at the time you talked to him?

"THE WITNESS: He had been drinking. We talked to him about his drinking, but he was completely responsive."

The interview lasted for approximately an hour and ten minutes.

"THE COURT: Did he answer your questions?

"THE WITNESS: Yes, sir, he did.

"THE COURT: And was he coherent?

"THE WITNESS: Yes, he was."

During the interview with Murphy the appellant indicated that he would talk about the bank robberies, but first he wanted to tell his wife. He attempted to call his wife on two occasions, one for approximately twenty minutes [R. T. 31], and another time for fifteen minutes [R. T. 32]. This evidence would indicate that the appellant was in control of his faculties and capable of understanding his rights. The appellant is not a first time offender; he has a long criminal record, including two prior bank robberies, and has had exposure to all stages of federal criminal procedure [R. T. 43, 53, 64].

The testimony by Agent Murphy indicates that the appellant was aware of his rights and that he freely and voluntarily answered the agent's questions.

III. THE FIFTH AMENDMENT DUE PROCESS CLAUSE DOES NOT REQUIRE UNIFORMITY BY THE VARIOUS CIRCUIT COURTS OF APPEALS IN THEIR APPLICATION OF TEST OF CRIMINAL RESPONSIBILITY.

(a) The appellant contends that if there is not uniformity in the test applied to the determination of whether a person is criminally responsible there is a denial of due process.

Due process of law consists in the protection of the individual against arbitrary action.

National Dairy Products Co. v. Milk Control Board of New Jersey, 44 A. 2d 796 (1945).

The purpose of the due process provisions, as they relate to judicial procedure, is to insure fundamental fairness.

State v. Hedgebeth, 45 S. E. 2d 563, cert. den., 334 U. S. 806 (1948).

The Supreme Court of the United States in Davis v. United States, 165 U. S. 373, 378 (1897), stated that submitting instructions embodying M'Naughten-irresistible impulse to the jury was, under the circumstances of that case, "in no degree prejudicial to the rights of the defendant." The M'Naughten-irresistible impulse rule was approved by this Court in Anderson v. United States, 237 F. 2d 118 (9th Cir. 1957).

In accord:

Sauer v. United States, 241 F. 2d 640 (9th Cir.), cert. den., 354 U. S. 940, 77 S. Ct. 1405 (1957);

Smith v. United States, 342 F. 2d 725 (9th Cir. 1965);

Maxwell v. United States, 9th Cir. No. 19,942 November 7, 1966.

Therefore, under no reasonable interpretation of the due process clause did the District Court in applying the M'Naughten-irresistible impulse test act in an arbitrary manner. In fact the Court was duty bound to apply that test under the doctrine of stare decisis.

In the case of Beck v. Washington, 369 U. S. 541 (1962),

the United States Supreme Court, stated:

"We have said time and again that the Fourteenth Amendment does not 'assume uniformity of judicial decisions or immunity from judicial error' . . . . "

Mr. Justice Frankfurter, in a concurring opinion in Snowden v. Hughes, 321 U.S. 1 (1944), stated:

"The Constitution does not assume uniformity of decisions or immunity from merely erroneous action, whether by the Court or the executive agencies of the state."

McGovern v. New York, 229 U.S. 363, 370, 371 (1913).

(b) Appellant did not raise the issue of lack of uniformity in the test of criminal responsibility among the various circuits in the District Court, therefore, cannot raise it for the first time on appeal.

In the case of Gagewski v. United States, 321 F. 2d 261 (8th Cir. 1963), the Court said:

"Under familiar rules we, as a reviewing court, are not required to consider or review actions of omission or commission by the trial court unless the complaining party made known to that court 'action which he desires the court to take or his objection to the action of the court and the grounds

therefor.' "

Rule 51, Federal Rules of Criminal Procedure;

Litton v. United States, 177 F. 2d 416, 418 (8th Cir. 1949), cert. den., 339 U.S. 921;

United States v. Miller, 316 F. 2d 81, 83 (6th Cir. 1963);

Swift v. United States, 314 F. 2d 860, 862 (10th Cir. 1963);

Grant v. United States, 291 F. 2d 746, 748 (9th Cir. 1961).

VII

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Marcus O. Tucker

MARCUS O. TUCKER